

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, ET AL.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 05-CV-329-GKF-PJC
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

ORDER

This matter is before the Court on Defendants’ application for attorney fees and costs [Dkt. No 1729] associated with their Motion to Compel Compliance with the Court’s Order of Data Production. [Dkt. No 1605].¹ Defendants Cargill, Inc. and Cargill Turkey Production, LLC, (“the Cargill Defendants”) seek total compensation of \$6,896.16.² Defendants Cal-Maine Foods, Inc., and Cal-Maine Farms, Inc., (“the Cal-Maine Defendants”) seek a total of \$6,049.29.

¹ In the Court’s *Opinion and Order* filed May 20, 2008, U.S. Magistrate Judge Sam Joyner found that some data that the Plaintiffs should have produced was not produced to Defendants until after their motion to compel had been filed. [Dkt. No. 1710 p. 4]. Judge Joyner held that the appropriate remedy was “to award Defendants their attorney’s fees and costs incurred in connection with the filing of the motion. [*Id.* p. 6]. Defendants were directed to file their itemized statement of costs within 30 days.

² The Cargill Defendants state that the total fees and expenses incurred as a result of the State’s conduct exceeds \$26,000.00. However, only \$6,896.16 is being claimed herein. This sum includes \$964.00 claimed by local counsel.

Factual Background

The roots of this particular fee dispute extend back at least to May 24, 2006, when Defendant Cobb-Vantress, Inc., filed its First Motion to Compel Discovery. [Dkt. No. 743]. On January 5, 2007, Judge Joyner sustained Cobb-Vantress's motion [Dkt. No. 1016] and directed that "the requested data, testing, sampling, and results shall be produced." [*Id.* at 8].

On February 29, 2008, Defendants jointly filed the Motion to Compel Plaintiffs' Compliance with the Court's Order on Data Production [Dkt. No. 1605] which was granted by Judge Joyner on May 20, 2008 [Dkt. No. 1710]. Relying primarily on Rule 37 of the Federal Rules of Civil Procedure, Judge Joyner held that Defendants were entitled to an award of fees and expenses. Plaintiff State of Oklahoma objected to Judge Joyner's *Opinion and Order* [Dkt. No. 1716], and this appeal was denied by the Court on Feb. 18, 2009 [Dkt. No. 1871].

Itemized statements of fees and expenses were filed on June 19, 2008 [Dkt. No. 1729].

Applicable Legal Standard

A request for an award of fees and costs associated with a Motion to Compel is a non-dispositive matter falling within a magistrate judge's authority under 28 U.S.C. § 636(b)(1)(A). *Hutchinson v. Pfeil*, 201 F.3d 448 (Table), at * 2 (10th Cir. 1999), *cert. denied*, 530 U.S. 1205 (2000) (Magistrate Judges "have the power to award attorney fees as non-dispositive discovery sanctions under 28

U.S.C. §636.”); *see also Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458, 1462 (10th Cir. 1988) (“Magistrates may issue orders as to non-dispositive pretrial matters, and district courts review such orders under a ‘clearly erroneous or contrary to law’ standard of review.”).

Rule 37 of the Federal Rules of Civil Procedure provides:

If the motion [to compel discovery] is granted--or if the disclosure or requested discovery is provided after the motion was filed--the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion ... to pay to the movant's reasonable expenses incurred in making the motion, including attorney's fees. . . .

Fed.R.Civ.P. 37 (a)(5)(A).

In determining the reasonable expenses, including fees, to be awarded, courts have used the lodestar method in which the Court multiplies the reasonable number of hours expended by a reasonable hourly billing rate. *Standard Oil Co. v. Osage Oil and Transp., Inc.*, 122 F.R.D. 267, 269 (N.D.Okla. 1988); *Ramos v. Lamm*, 713 F.2d 546, 552 (10th Cir. 1983). Here, the State of Oklahoma challenges the number of hours incurred by Defendants' counsel, but does not question the hourly rates.

Discussion

The Cargill Defendants claim reimbursement for 20.8 hours spent by Kristin Shults Carney, senior associate with Faegre & Benson, LLP's Denver office. Carney charges \$285.20 per hour. Cargill Defendants also seek reimbursement of \$964.00 for time expended by the Tulsa law firm of Rhodes, Hieronymus, Jones, Tucker & Gable. No itemized statement was submitted for this sum, however. Since Judge Joyner specifically directed that itemized statement be submitted and such information would be necessary to determine the appropriate lodestar amount, this \$964.00 must be disallowed.

The Court has reviewed the itemized statement of Carney and finds the time spent was reasonable and necessary. Carney spent her time reviewing data produced by Plaintiffs, coordinating with team members about the data production and the Motion to Order Compliance, and preparing for the motion hearing. State protests that Faegre & Benson claims other lawyers spent an additional 95 hours on the case – time for which compensation is not being sought – and that the Court cannot determine the reasonableness of Carney’s time without the itemization of the non-claimed hours. The Court rejects this contention.

Robert E. Sanders, attorney for Cal-Maine Defendants, claims 26.5 total billable hours at \$200 per hour (\$5,300) and travel and related expenses of \$749.29. Sanders’ records indicate that he spent 13.9 hours preparing for an oral presentation that lasted less than 30 minutes. In addition, Sanders spent 12.2 hours simply traveling to and from his office in Jackson, MS. The Court has several reservations about this time; especially, the number of hours spent in preparation and the decision to use an out-of state attorney to make a rather minor Court appearance when so many competent local attorneys have entered appearances in this case. This is a case that does not want for lack of lawyers, and many of the local attorneys who have appeared in the case could easily have handled this matter, thereby eliminating 12.2 hours of travel time. Accordingly, I find the travel time and associated expenses to be unreasonable in light of the circumstances presented here. Cal-Maine’s fees/expenses will be reduced by \$3,189.29 (\$2,440 for travel time and \$749.29 in travel expenses).

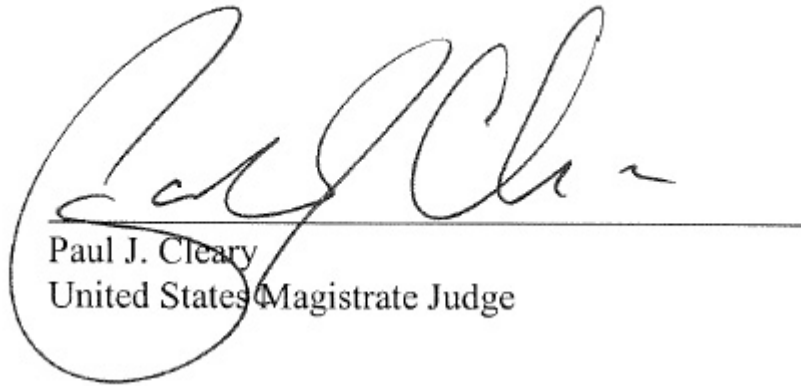
Accordingly, Plaintiff State of Oklahoma shall pay the Cargill Defendants and the Cal-Maine Defendants an award of fees and expenses as follows:

Cargill Defendants	\$5,932.16
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Cal-Maine Defendants	\$2,860.00
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TOTAL	\$8,792.16
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IT IS SO ORDERED this 7th day of August 2009.



Paul J. Cleary
United States Magistrate Judge